FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 26 1944
CHARLES ELMORE CROPLEY
CLERK

United States of America

IN THE

Supreme Court of the United States

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK,
Intervenor

BRIEF FOR APPELLANTS ON MOTION TO DISMISS

PAUL W. VOORHIES,
IRVIN LONG,
Counsel for Appellants,
2046 Penobscot Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., Case Bldg., 457 Port St. W., Detroit

SUBJECT INDEX

	Page
Facts Applicable to Motion to Dismiss	1
Argument:	
Summary of Points Asserted	5
I. It is Act 155, Public Acts 1937, with amendments, which the State Court held to be the bar to the right claimed by appellants	5
II. But if it should be decided that Act 114, Public Acts of 1937, is the bar to the right claimed by appellants, there is no impediment to this court's consideration of the same with respect to the contract clause of the Federal Constitution	7
III. Appellees' request embodied in their motion, that the decision of the Michigan Supreme Court be affirmed, should be denied	11

INDEX TO LEGAL CITATIONS

Federal Constitution:	
Article I, Sec. 10	1, 3, 4
Federal Statutes:	
Title 28, Sec. 344a U. S. C. A.	7, 8
Michigan Statutes:	
Act 114 P. A. 1937	1, 4, 5, 6, 10, 11
Act 155 P. A. 1937	2, 3, 4, 5, 6, 11
Sec. 4940, Mich. C. L. 1929	2
Sec. 3459, Mich. C. L. 1929	4

Page

Decisions:

Baker v. State Land Office Board, 294 Mich. 587 4
Bryant v. Zimmerman, 278 U. S. 63 10
Chicago, Rock Island, etc. Ry. Co. v. Perry, 259 U. S. 548 9
Herndon v. Lowery, 301 U. S. 242 9
Home Insurance Co. v. Dick, 281 U. S. 397 9
Michigan Central Ry. Co. v. Michigan Southern Ry. Co., 19 How. 379 8
Miedrick v. Lauenstein, 232 U. S. 236 9
Municipal Investors Assn. v. City of Birmingham, 300 Mich. 501 2, 3, 4
Murdock v. Memphis, 20 Wall. 590 8
North Caroline Ry. Co. v. Zachary, 232 U. S. 248 9
San Jose L. & W. Co. v. San Jose Ranch Co., 189 U. S. 177 8
State of Montana v. Rice, 204 U. S. 291 9
Sully v. National Bank, 178 U. S. 289 9
Whitfield v. State of Ohio, 297 U. S. 431 9

Text:

Robertson and Kirkham, Jurisdiction of Supreme Court, Sec. 77 10

United States of America

IN THE

Supreme Court of the United States

No.....

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK,
Intervenor

BRIEF FOR APPELLANTS ON MOTION TO DISMISS

FACTS APPLICABLE TO MOTION TO DISMISS

Appellees have partially stated the facts which ought to be known in passing on this motion, but are incorrect in their assumption that the Michigan Supreme Court was not asked to and did not pass upon the question of whether Act 114, Michigan Public Acts 1937, was repugnant to Article I, Section 10, of the Federal Constitution.

Throughout the argument they betray a misunderstanding as to the purpose of this case, evidently supposing that petitioners' object is to obtain a ruling that unpaid portions of the original assessment are enforceable against lands which have gone through the scavenger sale. In order to center the court's attention upon the real issue, we will review the pleadings, proceedings and the opinions.

PETITION (3): The allegations are (1) ownership of a part of the issue of bonds and insufficient funds for their payment, (2) failure to levy the deficiency assessment as provided in the portion of the drain law (Section 4940, Michigan Compiled Laws 1929) quoted on p. 3 of the typewritten copy of the opinion of the Supreme Court, Exhibit B attached to the jurisdictional statement, (3) willingness of the parties to enter into a refunding arrangement if it can be determined that all privately owned lands are subject to a deficiency assessment, (4) dispute as to the effect of Act 155, Michigan Public Acts 1937, and statutes *in pari materia* upon the right to the deficiency assessment authorized in Section 4940, Michigan Compiled Laws 1929 *(supra)*. Prayer for determination that Section 4940, Compiled Laws, requires such assessment, notwithstanding any subsequent legislation.

ANSWER (37): Admission of the fact that bonds are outstanding and unpaid; denial that the respondents are required to make any deficiency levy; reliance upon *Municipal Investors Association v. City of Birmingham*, 300 Mich. 501.

TRIAL COURT'S OPINION (41) finding that 65% of lands in the district are "either retained or have been sold by the state as tax delinquent land, subject to the provisions of the Scavenger Sale Act, being Act No. 155 of Public Acts of 1937, as amended." Determination that

Municipal Investors Association v. City of Birmingham (supra) requires decision that such lands are not subject to a deficiency levy, and this prevents all deficiency levies.

STATEMENT OF REASON AND GROUND FOR APPEAL (2): Assignment of errors on the part of trial court in holding that no deficiency levy could be made, and that privately owned lands are exempt from such levy.

OPINION OF SUPREME COURT: (Exhibit B to Jurisdictional Statement.) Court states facts and contentions of the parties, and ruling of trial court, to be "that lands sold * * * under the provisions of Act 155, Public Acts 1937 * * * were not subject to a deficiency assessment, and since a large portion of the lands in the district were lost to the possibility of reassessment, a deficiency assessment upon the remaining lands which had not been sold for delinquent taxes was 'contrary to all established principles of uniformity and equality in assessment as guaranteed by the Constitution,' in that such assessment 'would be a tax having no relationship to benefit.' "

Contention of appellants is stated thus: "Lands which have been sold to State for delinquent taxes are not exempt from the deficiency assessments after their resale by the State, and that, if the act in question provides for such exemption, it is in violation of 'a section of the state constitution (not relevant to the federal question),' and they further contend 'that if the act is construed to exempt such lands from deficiency assessments, it does so in violation of the impairment of obligations clause of the State and Federal Constitutions.' "

The court then quotes from four statutes, (a) the provision of the drain law directing a deficiency assessment, (b) provision of the drain law requiring collection of drain taxes in the same manner as general taxes, (c) pro-

vision directing what the decree on a tax sale shall say. The court must here note that in connection with this provision, while no mention is made of Act 114, Michigan Public Acts 1937, the decree provision quoted first came into the law by virtue of that statute, which was an amendment to 1 Comp. Laws 1929, Section 3459. (d) Provisions of Act 155 to the effect that a quit claim deed from the State Land Office Board conveys title free from all encumbrances, including all taxes and special assessments cancelled by the decree pursuant to which the State obtained title.

The court then says: "The latter Act was discussed in *Municipal Investors Association v. City of Birmingham* • • •" and "held that 'anything is an encumbrance which constitutes a burden on the title,' and that 'it would naturally follow that the possibility of reassessment would constitute an encumbrance and thus be cancelled.'"

The court then considers reasons advanced by appellants against this meaning, but says: "Our Birmingham decision is authority for the proposition that the possibility of reassessment would constitute an encumbrance, and is, therefore, cancelled." It then turns to the federal question, saying: "In considering appellants' argument with respect to the impairment to the obligations of the contract, it is important that the underlying cause leading to the legislation, which appellants now attack, be fully comprehended and understood." It refers to *Baker v. State Land Office Board*, 294 Mich. 587, 592, and the Birmingham case, saying that the impairment argument was denied in each. It then notes that Act 155 provides for division between various taxing units of the money received on the sale of properties, and concludes: "That portion of the Act cancelling taxes is a valid exercise of the police power." The act last mentioned is Act 155, hence it must be the one to which the court attributes the effect of extinguishing the right to a deficiency assessment.

ARGUMENT

SUMMARY OF POINTS ASSERTED

1. It is Act 155, Public Acts 1937, with amendments, which the State Court held to be the bar to the right claimed by appellants.

2. But if it should be decided that Act 114, Public Acts of 1937, is the bar to the rights claimed by appellants, there is no impediment to this court's consideration of same with respect to the contract clause of the Federal Constitution.

3. Appellees' request embodied in its motion that the decision of the Michigan Supreme Court be affirmed should be denied.

I.

IT IS ACT 155, PUBLIC ACTS 1937, WITH THE AMENDMENTS, WHICH THE STATE COURT HELD TO BE THE BAR TO THE RIGHT CLAIMED BY APPELLANTS

The opinion of the Michigan Supreme Court must be accepted as the authoritative statement of the meaning of the acts of the Michigan Legislature. When it points to a certain statute and says that it means that holders of these bonds may not have the full deficiency assessment guaranteed to them by the law which entered into and formed a part of their bond contract, it is useless to argue that it would be more logical to say that some other statute had that effect. It is the law of the case that it was Act 155 which has changed appellants' rights, because the Michigan Supreme Court in its opinion has said so. It has held itself bound by its prior decision in the Birming-

ham case, the same decision invoked by respondents in their answer. It has held that the Birmingham case interpreted Act 155 to bar the deficiency assessment there requested. It nowhere says that this result follows from Act 114, and its quotation from this statute must be interpreted as an aid to its construction of Act 155, since reference to statutes *in pari materia* passed at the same session of the legislature and resulting from the same legislative purpose, frequently aids a court in interpreting language of doubtful meaning.

It seems to us quite logical for the court to consider Act 155 as the one which bars the deficiency assessment, once it has arrived at the conclusion that the possibility of a reassessment is an encumbrance, for it is only through the operation of this Act that lands in the drain district acquired by the State can get back to private ownership. An owner of lands who claims them to be exempt from a tax of this nature must, in order to present his argument that they are exempt, point to this statute as the source of his title, and must claim that it conferred the exemption. If such statute had been silent as to the effect to be given to a quit claim deed from the State Land Office Board, it is difficult to see how a purchaser could resist the imposition of an additional assessment. There would be no statutory provision which he could invoke as a declaration of a legislative purpose that his lands should not be subject to any assessment which other statutes required should be levied.

II.

BUT IF IT SHOULD BE DECIDED THAT ACT 114, PUBLIC ACTS OF 1937, IS THE BAR TO THE RIGHTS CLAIMED BY APPELLANTS, THERE IS NO IMPEDIMENT TO THIS COURT'S CONSIDERATION OF THE SAME WITH RESPECT TO THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION

It must be recognized that this court has been assigned the duty of reviewing state decisions which appear to deprive citizens of rights enjoyed under the Federal Constitution. As a reviewing court, it is entitled to know that there was some ruling by the lower court on a question within this court's jurisdiction, and that its determination was essential to the disposition of the case. The language of Title 28.344a is broad. It is only essential that the validity of a state statute under the Federal Constitution be "drawn in question" and that the state court shall have upheld the validity. Congress has not declared how or when the validity of such statute be drawn in question. It is enough if this court see by fair intendment that there was a federal question in the case, that it was considered by the lower court, and that a decision was reached which was vital to the ultimate disposition of the case.

There must naturally be a variety of circumstances under which a federal question may be presented. Frequently it must happen that it comes into the case after it is far advanced, *e.g.*, where it furnishes the basis of rebuttal against a defense. Since a plaintiff is not obliged to anticipate a defense and plead legal conclusions against same, it cannot be expected in all cases that the pleadings in the trial court should show the raising of the federal question. This is particularly true in the class of cases to which this belongs—claims by bondholders that taxing

officials should levy the taxes necessary to provide funds for the payment of their bonds. In support of their claim they must point to a statute under which the bonds were issued which requires such levy. If the defendant officials admit the existence of such a statute, they must plead matters in avoidance. When such matters involve subsequent legislation which abrogates in whole or in part the former statute invoked by bondholders, two questions may arise: (1) whether the statute means what the defendants say it does, and (2) whether it constitutes an impairment of contract rights. In such a situation the court does not really arrive at the point where the second question must be considered until after it has interpreted the subsequent statute and decided that it limits or abrogate the former one. If at that time it is apparent that the court has considered and ruled upon the question with respect to the Federal Constitution, it has been "drawn in question" as provided in the Acts of Congress defining this court's jurisdiction.

From some of the cases cited by appellees on p. 7 of their brief, it appears that they have failed to note that it is no longer the rule that the record itself must show that a federal question was raised, and that it is insufficient to show it by the lower court's opinion. It was once the provision of the statute that the record must itself show the raising of the federal question, and this explains *Michigan Central Ry. Co. v. Michigan Southern Ry. Co.*, 19 How. 379. In a later decision, *Murdock v. Memphis*, 20 Wall. 590, 633, decided after there had been a change of the statute, this requirement was held to be no longer applicable. In *San Jose L. & W. Co. v. San Jose Ranch Co.*, 189 U. S. 177, where a federal claim under an Act of Congress was invoked as rebuttal to a defense and there was a motion to dismiss, the court in denying the motion said:

"While the right under the Act of 1887 (the Act of Congress) thus considered was not originally specially set up and claimed by plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one that appears to have been insisted upon in the argument; and under the rule of this court requiring the opinion to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed' that it was fully considered in the opinion and ruled against plaintiff in error. (Citations.) These must be considered as leading, under our change of rule, to a different result from that reached in some prior cases (citations) in which we held that the opinion of the state court could not be resorted to for the purpose of showing that a question of federal cognizance was decided."

In *State of Montana v. Rice*, 204 U. S. 291, 299, the court in more general terms declared:

"Where it clearly and unmistakably appears from the opinion of the state court under review that a federal question was assumed by the highest court of the state to be in issue, was actually decided against the federal claim, and the decision was essential to the judgment rendered, it is sufficient to give this court authority to re-examine that question on writ of error."

Other decisions to like effect are:

Sully v. National Bank, 178 U. S. 289;
Chicago, Rock Island, etc. Ry. Co. v. Perry, 259 U. S. 548;
Miedrick v. Lauenstein, 232 U. S. 236;
North Caroline Ry. Co. v. Zachary, 232 U. S. 248;
Home Insurance Co. v. Dick, 281 U. S. 397;
Whitfield v. State of Ohio, 297 U. S. 431;
Herndon v. Lowery, 301 U. S. 242.

In their work entitled "*The Jurisdiction of the Supreme Court,*" Robertson and Kirkham say, Art. 77:

> "If the highest state court assumes that the record sufficiently presents a federal question and proceeds to decide it, the Supreme Court will look no further to determine whether it was properly raised, for it is an elementary rule that it is irrelevant to inquire how and when a federal question was raised in a (state) court * * * when it appears that such question was actually considered and decided."

The liberal interpretation required in order that this court can perform the function assigned to it is illustrated in the following, from *Bryant v. Zimmerman*, 278 U. S. 63:

> "There are many ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrase is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by fair intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment is to deny the claim, that is enough."

Applying these principles to the instant case, let us suppose that the Michigan Supreme Court had said substantially as follows: "Appellants are in error in supposing that Act 155 has the effect of changing the duties and obligations of respondents; the change is produced by Act 114," and had proceeded in its argument as to why the legislation does not in its opinion impair the obligation

of contract contrary to the Federal Constitution." Could anyone suppose that the federal question had not been brought to its attention and decided?

We think appellees' brief affirmatively shows this. They admit that in petitioners' initial petition they contended that neither Act 155 nor any other statute *in pari materia* could have the effect of abrogating or curtaining their rights without being in conflict with Article I, Section 10, of the Federal Constitution. They admit that in their reply brief in the Michigan Supreme Court appellants discussed Acts 114 and 155 of 1937 in connection with the impairment argument. In the face of the state court's decision of the impairment argument with reference to the statutes passed in 1937 to bring about a rehabilitation of lands long tax delinquent, there is no point in urging upon this court an examination of the precise language of the statement of questions which prefaced appellants' brief. The Michigan court certainly did not regard itself confined thereby, and since it is no concern of this court how or when the federal question was presented, so long as it appears that it was actually considered and decided, the entire argument in support of the motion to dismiss fails.

III.

APPELLEES' REQUEST EMBODIED IN THEIR MOTION, THAT THE DECISION OF THE MICHIGAN SUPREME COURT BE AFFIRMED, SHOULD BE DENIED

A motion to affirm can only be granted where it appears that there is no debatable ground for assailing the decision of the lower court. Generally this exists only when this court has previously ruled on the precise question against the contention of appellant. This, of course, cannot be said with respect to this case.

By our jurisdictional statement we show a state of law existing at the time the bonds in question were issued, which must be considered as having entered into and formed a part of the contract, under which it would have been the duty of respondents to levy and spread a deficiency assessment against all privately owned lands in the drain district, irrespective of their source of title, and against the municipalities against which an at large assessment was leviable, in an amount sufficient to retire the bonds. By state legislation subsequently enacted, as construed by the state court of last resort, there has been a marked limitation of this duty, as a result of which there can be but a small amount of taxes enforceable, and a very substantial part of the debt represented by the bonds must go unpaid. There is no question as to the existence of the contract, and no question as to its impairment. The only question is as to whether there is some inherent power of state sovereignty which so limits Article I, Section 10, of the Federal Constitution that a state legislature may disregard its command when it considers that public welfare requires it. To date this court has not been willing to construe the contract clause as so limited, and thus we have presented a vital and important question, which ought to be answered by this court.

We, therefore, submit that the motion of appellees should be denied, and further proceedings in the appeal should be permitted.

PAUL W. VOORHIES,
IRVIN LONG,
Counsel for Appellants.